

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PRIMO'S RESTAURANT,

Plaintiff,

v.

MICHAEL CHERTOFF, as Secretary of the Department of Homeland Security;
DR. EMILIO GONZALEZ, as Director of U.S. Citizenship & Immigration Services;
Paul NOVAK, as Center Director of the U.S. Citizenship & Immigration Services for the Vermont Service Center,¹

Defendants.

Civil Action No. 04-12162-NG

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
TO AFFIRM ADMINISTRATIVE DECISION**

The Plaintiff, Primo's Restaurant ("Primo's"), brought this action under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, challenging the July 9, 2004, denial of an I-140 Petition for an Immigrant Worker by the Vermont Service Center ("VSC") of the U.S. Citizenship and Immigration Services ("CIS").² The VSC denied the petition because Primo's had not established its ability to pay the immigrant worker the proffered wage. On administrative appeal, the CIS Administrative Appeals Office ("AAO") affirmed the VSC decision. Primo's now challenges the decision arguing that it submitted sufficient evidence to

¹ Since the pendency of this case, a number of Defendants, sued in their official capacity, have changed. Pursuant to Fed. R. Civ. P. 25(d)(1), the names of these officers' successors are automatically substituted as a party.

² The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service ("INS"), 6 U.S.C.A. § 291(a), and transferred its functions to the CIS, a bureau of the Department of Homeland Security. 6 U.S.C.A. § 271(a). The statute establishes the position of Director of the Bureau of Citizenship and Immigration Services, whose functions include adjudicating immigrant visa petitions. 6 U.S.C.A. § 271(b)(1).

establish its ability to pay the proffered wages. Primo's further argues that the agency's decision was arbitrary and capricious and not in accordance with the law under the APA, 5 U.S.C. § 701 *et seq.* As explained in the accompanying Memorandum In Support, the CIS's review process and final decision are supported by the facts established in the VSC and AAO Administrative Record and applicable regulations and law. Accordingly, the Court should grant the federal Defendants' Motion for Summary Judgment to Affirm Administrative Decision.

Respectfully submitted,

DEPARTMENT OF HOMELAND
SECURITY, ET AL.,

MICHAEL K. LOUCKS
Acting United States Attorney

By: /s/ Anton P. Giedt 9/22/2006

Anton P. Giedt
Assistant U.S. Attorney
1 Courthouse Way
Boston, MA 02210
617-748-3309 (Voice)
617-748-3971 (Fax)
anton.giedt@usdoj.gov

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts
DATE: September 22, 2006

I, Anton P. Giedt, Assistant U.S. Attorney, do hereby certify that I have this day served a copy of the foregoing upon the Plaintiff's counsel of record through electronic filing and First Class Mail.

/s/ Anton P. Giedt
Anton P. Giedt
Assistant U.S. Attorney

PLAINTIFF'S COUNSEL:
Desmond Fitzgerald, Esq.
Fitzgerald & Company, LLC
18 Tremont Street, Suite 210
Boston, MA 02108
617-523-6320 (Voice)
617-523-6324 (Fax)

AGENCY COUNSEL:
Peter Schmalz - Associate Counsel
Citizenship & Immigration Service - Vermont Service Center
U.S. Department of Homeland Security
75 Lower Welden Street
St. Albans, VT 05479
802-288-7842 (Voice)
802-288-7838 (Fax)
Peter.schmalz@dhs.gov